IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 7, 2001 Session

WANDA SUE GRUBBS v. RAE PILKINGTON

A Direct Appeal from the Circuit Court for Maury County
No. 8807 The Honorable Stella Hargrove, Judge

No. M2000-02965-COA-R3-CV - Filed December 28, 2001

Plaintiff was injured when attacked by defendant's dog on August 7, 1996 at defendant's Maury County residence. Plaintiff filed suit against defendant on August 7, 1997. Process was returned September 12, 1997, with notation "unable to locate, moved to KY." On November 30, 1998, the trial court dismissed the complaint for failure to renew process pursuant to Tenn.R.Civ.P. 3. On August 6, 1999, plaintiff filed another suit against defendant, and she was duly served by certified mail at her Kentucky address. The trial court granted defendant's motion for summary judgment finding that from the undisputed facts, plaintiff could not rely upon the tolling statute, T.C.A. § 28-1-111, and that plaintiff's action is barred by the one-year statute of limitation. Plaintiff appeals. We affirm.

Tenn.R.App.P. 3; Appeal as of Right; Judgment of the Affirmed and Remanded

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and DAVID R. FARMER, J., joined.

Gary Howell, Columbia, For Appellant, Wanda Sue Grubbs

Barbara J. Perutelli, Nashville, For Appellee, Rae Pilkington

OPINION

On August 7, 1997, plaintiff, Wanda Sue Grubbs, sued defendant, Rae Pilkington, for personal injuries sustained on August 7, 1996, when she was bitten by defendant's dog at defendant's residence in Maury County, Tennessee. On November 30, 1998, the case was dismissed for failure to reissue process in compliance with Tenn.R.Civ.P. 3.[1] Plaintiff filed the instant suit on August 6, 1999, and defendant was duly served at her Kentucky address.

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[1] This procedural history is recited by the trial court in its order granting summary judgment, and was filed by defendant as an undisputed fact in support of the motion for summary judgment.

On September 1, 2000, defendant filed a motion for summary judgment on the ground that plaintiff's suit was barred by the one-year statute of limitations, and that plaintiff cannot rely upon the tolling statute, T.C.A. § 28-1-111, because of her lack of due diligence. In support of the motion, defendant filed and relies upon her affidavit, the affidavit of Lisa Berry, and the affidavit of Jody L. Fennell.

Defendant's affidavit states that on August 7, 1996, defendant lived at 1800 Hayes Denton Road, and that on August 15, 1997, she moved to 622 East Dixie Highway, Elizabethtown, Kentucky, and has lived there continually until the present time. The affidavit states that the post office in Columbia, Tennessee was given the change of address, and the tax assessor was also given the change of address, because she still owned the real property in Maury County. She further states that she periodically visited her daughter, Lisa Berry, in Maury County and saw plaintiff on several occasions but was never asked for her address.

Lisa Berry's affidavit states that she resides at 1834 Hayes Denton Road, Columbia, Tennessee, and that in August, 1996, she and the plaintiff were good friends and remained good friends until the summer of 1999. She states that after plaintiff's August 1996 injury, she and the plaintiff continued to see each other on a regular basis. Plaintiff knew that the defendant had moved to Kentucky, and at no time did the plaintiff ask for information concerning the defendant's address. Affiant states that had the address been requested, she would have given the address to plaintiff.

Jody Fennell's affidavit states that she is a claims examiner for the American Family Home Insurance Company, the defendant's insurer, and was handling the claim concerning Wanda Grubbs. Ms. Fennell states that she was in communication with Wanda Grubbs's attorney, Gary Howell, and neither Howell nor Grubbs requested that she provide the defendant's address. Had they done so, Ms. Fennell states that she would have provided the address.

In addition, pursuant to Tenn.R.Civ.P. 56.03, defendant filed a "Statement of Undisputed Facts" to which no response was made by plaintiff. We quote the undisputed facts:

> 1. The plaintiff's cause of action for personal injury arose on August 7, 1996.
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> 2. The plaintiff filed suit and process was issued against the defendant on August 7, 1997 in the Circuit Court for Maury County, Tennessee, under docket number 7778. On September 12, 1997, process was returned unserved with a notation "unable to locate, moved to KY."
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> 3. On November 30, 1998, the complaint was dismissed pursuant to the defendant's motion under the authority of Rule 3 of the Tennessee Rules of Civil Procedure. At that time, the Court did not address T.C.A. § 28-1-111.

4. On August 6, 1999 the plaintiff re-instituted suit and process was issued under Maury County Circuit Docket Number 8807.

5. The defendant was served by certified mail on August 28, 1999 at PO Box 555, Elizabethtown, Kentucky.

6. For the purposes of this Motion only, the following fact will be undisputed: When the plaintiff filed suit in August of 1997, the defendant's daughter, Lisa Berry, knew that the plaintiff was instituting suit against her mother and gave the plaintiff the information used in the lawsuit.

7. The plaintiff knew that the defendant had moved to Kentucky because she put her home, which was a block from Lisa Berry, up for sale. The plaintiff knew that the defendant's husband had been transferred to Kentucky.

8. In October of 1998, the plaintiff attended Lisa Berry's wedding where she saw the defendant, Rae Pilkington. She spoke to the defendant, but she did not ask her for her address. Had she done so, Rae Pilkington would have given her the address.

9. After the plaintiff's injury in August of 1996, she maintained her friendship with the defendant's daughter, Lisa Berry, until the summer of 1999. During that time period, she never asked Lisa Berry for her mother's address. Lisa Berry would have given her her mother's address if she had been asked.

10. The plaintiff never contacted the post office to get a forwarding address for the defendant after she moved.

11. The plaintiff has not hired anybody to determine where the Pilkingtons lived in Kentucky and does not know whether her attorney has done so.

12. Plaintiff's counsel communicated with the defendant's insurance carrier, but never requested an address for the defendant. Had he done so, the carrier would have provided the information requested.

13. Rae Pilkington moved from her home on Hayes Denton Road to Elizabethtown, Kentucky, on August 15, 1997 and has resided at that same address through the current date. She gave her forwarding address of Box 555, Elizabethtown, Kentucky, to the Columbia,

> Tennessee Post Office and to the Maury County Assessor. She still owns property on Hayes Denton Road.
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> 14. After moving to Kentucky, the defendant made regular visits to Columbia, Tennessee and would spend up to a week at a time visiting with her daughter on Hayes Denton Road in Columbia. On the occasions that she saw the plaintiff, she never asked for her address in Kentucky.

In opposition to the motion for summary judgment, plaintiff filed the affidavit of Gary Howell. He states that he started his representation of plaintiff in January 1997, and at that time until April of 1998, he was engaging in negotiations with Jody Fennell of defendant's insurance company. He states that he filed suit in August of 1997 to prevent the running of the statute of limitations. After he was unable to obtain service on defendant, he inquired as to whether the insurance company would accept service on behalf of defendant. At Ms. Fennell's request, he sent her a copy of the complaint that he filed and had no further communication from Ms. Fennell or anyone else representing defendant until the filing of defendant's pleadings.

On October 24, 2000, the trial court filed its order granting the motion for summary judgment finding that the plaintiff did not exercise due diligence in attempting to obtain service upon the defendant and is thereby precluded from relying upon T.C.A. § 28-1-111. Plaintiff has appealed, and the only issue for review is whether the trial court erred in granting summary judgment.

A motion for summary judgment should be granted when the movant demonstrates that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. Tenn. R. Civ. P. 56.04. The party moving for summary judgment bears the burden of demonstrating that no genuine issue of material fact exists. ***Bain v. Wells***, 936 S.W.2d 618, 622 (Tenn. 1997). On a motion for summary judgment, the court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence. ***Id.*** In ***Byrd v. Hall***, 847 S.W.2d 208 (Tenn. 1993), our Supreme Court stated:

> Once it is shown by the moving party that there is no genuine issue of material fact, the nonmoving party must then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant a trial. In this regard, Rule 56.05 [now Rule 56.06] provides that the nonmoving party cannot simply rely upon his pleadings but must set forth *specific facts* showing that there is a genuine issue of material fact for trial.

Id. at 211 (citations omitted) (emphasis in original).

Summary judgment is only appropriate when the facts and the legal conclusions drawn from the facts reasonably permit only one conclusion. ***Carvell v. Bottoms***, 900 S.W.2d 23, 26 (Tenn. 1995). Since only questions of law are involved, there is no presumption of correctness regarding a trial court's grant of summary judgment. ***Bain***, 936 S.W.2d at 622. Therefore, our review of the trial court's grant of summary judgment is ***de novo*** on the record before this Court. ***Warren v. Estate of Kirk***, 954 S.W.2d 722, 723 (Tenn. 1997).

Actions for personal injuries must be commenced within one year after the cause of action accrues. T.C.A. § 28-3-104 (2000). There are exceptions to the application of the period of limitation, one of which, T.C.A. § 28-1-111, plaintiff asserts is applicable to the instant case. The statute provides:

> **28-1-111. Suspension during absence from state.** - If at any time any cause of action shall accrue against any person who shall be out of this state, the action may be commenced within the time limited therefor, after such person shall have come into the state; and, after any cause of action shall have accrued, if the person against whom it has accrued shall be absent from or reside out of the state, the time of absence or residence out of the state shall not be taken as any part of the time limited for the commencement of the action.

Although defendant moved from Tennessee to Kentucky, she was subject to the jurisdiction of the Tennessee court by virtue of the long-arm statute, T.C.A. § 20-2-214, which provides in pertinent part:

> **20-2-214. Jurisdiction of persons unavailable to personal service in state - Classes of actions to which applicable.** - (a) Persons who are nonresidents of Tennessee and residents of Tennessee who are outside the state and cannot be personally served with process within the state are subject to the jurisdiction of the courts of this state as to any action or claim for relief arising from:
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> * * *
>
> (2) Any tortious act or omission within this state;

Although we find no case in this state dealing with the applicability of T.C.A. § 28-1-111 in actions where jurisdiction is based upon T.C.A. § 20-2-214, the courts of this state have dealt with the applicability of the suspension statute in other situations - most notably as it deals with nonresident motorists. In ***Arrowood v. McMinn County***, 121 S.W.2d 566 (Tenn.1938), plaintiff, as administratrix of her son's estate, filed suit for his wrongful death against a nonresident motorist after the one-year statutory period of limitations applicable to the case had expired. The nonresident

motorist was served with process pursuant to the nonresident motorist statute. The plaintiff contended that the suspension statute, forerunner of § 28-1-111, tolled the statute of limitations for the period that the nonresident motorist was out of the state. Our Supreme Court, noting that the nonresident motorist was amenable to service of process through the Secretary of State, said:

> The applicable principle laid down by our decisions is that when the remedy of the suitor is complete and unaffected by the absence of the defendant, when his non-residence does not affect the right to sue, Code, Section 8581 (Act of 1865) providing that "the time of his absence or residence out of the state shall not be taken as any part of the time limited for the commencement of the action" is without application.

121 S.W.2d at 567.

In ***Carr v. Borchers***, 815 S.W.2d 528 (Tenn. Ct. App. 1991), this Court noted an exception to the ***Arrowwood*** rule and stated that service on the Secretary of State pursuant to the nonresident motorist statute, absent requisite notice to the defendant, constitutes sufficient service of process to toll the statute of limitations ***provided*** that the plaintiff has exercised due diligence in ascertaining the defendant's whereabouts. ***Carr*** at 532.

The Supreme Court considered the issue in ***Lam v. Smith***, 891 S.W.2d 207 (Tenn. 1994). In ***Lam***, the plaintiffs were injured in an automobile accident with Smith on January 5, 1989, and on December 28, 1989, filed suit against Smith. Process was addressed to Smith at "7869 National, Millington, Tennessee, 38053." Process was returned on January 8, 1990 with the notation "moved." Process was again issued May 11, 1990, and return was made May 17 with the same notation as before. Sometime in September of 1990, Lam's attorney requested information from Smith's insurance company as to Smith's whereabouts, but the insurer was only able to provide the Millington address. ***Id.*** at 208. Private process servers were hired to accomplish service of process, but the attempt was unsuccessful. A private detective was hired to locate Smith, and this was also unsuccessful. Later, the Lams hired a second private detective agency, and Smith was finally located in North Carolina. An amended complaint was filed on September 27, 1991, summons was issued to the Tennessee Secretary of State pursuant to the non-resident motorist statute. It developed from the discovery proceedings that Smith moved from Millington to North Carolina on February 15, 1989, when her marine husband was transferred. The trial court dismissed the action, because the Lams failed to comply with Tenn.R.Civ.P. 3. The Court of Appeals, relying on ***Arrowwood*** and ***Carr*** affirmed the judgment. The Supreme Court, in reversing the Court of Appeals, stated:

> In conclusion, we hold that the ***Arrowood*** rule should not automatically apply to a situation where the plaintiff has no knowledge that the defendant is an out-of-state resident. *Rather, the plaintiff may rely on the suspension statute if the failure to utilize the method of service is justified under the circumstances of the case.* In

> other words, if the plaintiff has used due diligence in trying to ascertain the location of the defendant, he is not precluded from relying upon the suspension statute. Therefore, because the Lams have clearly exhibited due diligence in trying to ascertain the whereabouts Smith, the holding of the Court of Appeals is reversed.

891 S.W.2d at 212 (emphasis in original).

Subsequent to the ***Lam*** decision, this Court decided the case of ***Ballard v. Ardenhani***, 901 S.W.2d 369 (Tenn. Ct. App. 1995). In addition to issues involving the uninsured motorist statute, a primary issue was whether the statute of limitations was tolled while the defendant was out of the country. The plaintiff relied upon T.C.A. § 28-1-111 to suspend the operation of the statute of limitations. This Court, in affirming the trial court's dismissal of plaintiff's action, held that plaintiff failed to satisfy the prerequisite necessary to toll the statute of limitations as outlined in ***Lam***. The Court said:

> Plaintiff has not used due diligence in attempting to locate and serve Defendant. The record shows that plaintiff made virtually no effort to locate defendant. In fact, plaintiff's only effort was to write one letter to defendant's insurance company requesting information as to defendant's whereabouts. Furthermore, plaintiff did not even make this feeble attempt until over one year after the issuance of the original process. Clearly, this lackadaisical pursuit of defendant falls well short of the effort (which was approved by the Supreme Court) made by the plaintiffs in ***Lam***.

901 S.W.2d at 374.

In the instant case, plaintiff's diligence very closely resembles that of the plaintiff in ***Ballard***, and there simply is no dispute under the facts of this case that plaintiff did not exercise due diligence to ascertain the address of the defendant and accomplish proper service of process.

Accordingly, the order of the trial court granting summary judgment to defendant is affirmed. This case is remanded to the trial court for such further proceedings as may be necessary. Costs of the appeal are assessed against the appellant, Wanda Sue Grubbs, and her surety.

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W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.